

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF IDAHO

IN RE)	
)	Case No. 00-00353
MARY MARGARET PRICKETT,)	
)	SUMMARY ORDER
Debtor.)	
_____)	

Background and Facts.

In this Chapter 13 case, the Trustee John Krommenhoek objects to the allowance of attorney Barry Peters' ("Claimant") proof of claim for legal services performed for Debtor Mary M. Prickett before she filed for bankruptcy. Claimant asserts a portion of his claim is entitled to priority under Section 507(a)(3) of the Bankruptcy Code. Claimant provided legal services to Debtor in connection with a real estate foreclosure proceeding during the ninety days prior to the filing of Debtor's bankruptcy petition. Claimant's reply to the Trustee's objection asserted priority for \$1,218.00, representing 8.4 hours of legal services billed at a rate of \$145 per hour, the remaining \$629.00 being an unsecured claim for services rendered outside the ninety-day period. Following a hearing on the objection conducted on July 18, 2000, the matter was taken under advisement.

Discussion.

A properly filed proof of claim constitutes prima facie evidence of the validity and amount of the claim. Fed. R. Bankr. P. 3001(f) (2000). Should an objection to the claim be filed, the objector must rebut the presumption of validity, and the claimant then must sustain the ultimate burden of proof. *In re Holm*, 931 F.2d 620, 623 (9th Cir. 1991). Here, the Trustee objected to Claimant's priority claim as outside the meaning of Section 507(a)(3), leaving Claimant with the burden of proof.

The Bankruptcy Code provides in pertinent part:

(a) The following expenses and claims have priority in the following order:

. . . .

(3) Third, allowed unsecured claims, but only to the extent of \$4300 for each individual or corporation, as the case may be, earned within 90 days before the date of the filing of the petition or the date of the cessation of the debtor's business whichever occurs first, for

(A) wages, salaries, or commissions, including vacation, severance and sick leave pay earned by an individual. . . .

11 U.S.C. § 507(a)(3) (2000).

Although the Bankruptcy Code does not define wages, salaries, or commissions, the purpose of wage priority is “to enable employees displaced by bankruptcy to secure, with some promptness, the money directly due to them in back wages, and thus to alleviate in some degree the hardship that unemployment usually brings to workers and their families.” *United States v. Embassy Restaurant, Inc.*, 359 U.S. 29, 32 (1959). The key distinction entitling a claimant to priority under Section 507(a)(3) is whether the relationship between the debtor and creditor is that of employer-employee rather than some other contractual relationship. *In re Hutchison*, 223 B.R. 586, 588 (Bankr. M.D. Fla. 1998). A claim is entitled to priority only where there is a real status of employer-employee between the debtor and the claimant. *In re Grant Industries, Inc.*, 133 B.R. 514, 515 (Bankr. W.D. Mo. 1991).

No decisive test has been developed by bankruptcy courts in determining employee status for priority wage claims. One bankruptcy court looked to other law, including state worker’s compensation and federal tax withholding regulations, in determining whether an employment relationship exists for the purposes of granting priority to claims under Section 507(a)(3). *In re Saint Joseph’s Hosp.*, 126 B.R. 37 (Bankr. E.D. Pa., 1991). In the absence of

other authority cited by the parties or discovered by the Court, the Court will adopt the approach of *In re Saint Joseph's Hosp.*

Idaho has developed a four part test to distinguish employer-employee relationships from those of principal-independent contractor in worker's compensation litigation:

(1) there must be evidence of the employer's right to control the employee; (2) the method of payment, i.e., whether the employer withholds taxes; (3) whether the master or servant furnishes major items of equipment; and (4) whether either party has the right to terminate the relationship at will, or whether the one is liable to the other in the event of preemptory [sic] termination."

Livingston v. Ireland Bank, 910 P.2d 738, 741 (Idaho 1995). The four factors are balanced to determine the weight and importance of each. *Id.* Only employees and not independent contractors are covered by the worker's compensation statutes.

The United States Department of the Treasury has promulgated a similar test to determine if taxes should be withheld from a worker's income. An individual is an employee for tax purposes if under the usual common law rules the relationship between him and the person for whom he performs services is that of employer and employee.

Generally such [an employer-employee] relationship exists when the person for whom services are performed has the

right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. . . . The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. . . . *Individuals such as physicians, lawyers, dentists . . . engaged in the pursuit of an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees.*

26 C.F.R. § 31.3121(d)-2(c)(2) (2000) (emphasis added).

In applying these factors to determine whether the relationship between Claimant and Debtor was that of employer-employee, one critical consideration in both the worker's compensation and the federal tax withholding tests focuses on the employer's right to control the employee. During the hearing on the priority of Claimant's wage claim, Claimant indicated he considered himself Debtor's employee. However, his arrangement with Debtor was the traditional attorney-client relationship without extraordinary terms. The rules of professional conduct provide "[i]n representing a client, a lawyer shall exercise independent professional judgment and render candid advice." Idaho Rules of Professional Conduct (IRPC) Rule 2.1 (2000). Also, the comments to IRPC Rule 1.2 indicate that both the attorney and the client have responsibility

and authority for the objectives and means of the representation. In light of the IRPC and Claimant's statement that the relationship between him and Debtor was a traditional attorney-client relationship, the Court concludes that while Debtor had the right to instruct her counsel, Claimant was obligated to exercise independent judgment, and therefore, Debtor did not exercise that type of "control" over Claimant inherent in an employer-employee relationship.

Other factors common to both tests are whether the employer furnishes equipment or a place to work to employees, and the employer's right to discharge an employee at will. Claimant did not show that Debtor furnished him with any equipment or a place in which to work, and the Court doubts that was the case. However, a client does retain the right to discharge an attorney in an attorney-client relationship, similar to the employer's right to discharge an employee at will. IRPC Rule 1.16, official comments.

Last, Idaho's worker's compensation test considers whether the employer withholds taxes from compensation paid to the employee. Claimant indicated his professional relationship with Debtor was nothing more than a traditional attorney-client relationship. Claimant offered no evidence indicating Debtor withheld any employment taxes from his fees.

Both tests indicate the factors should be balanced. In this instance, one factor weighs in favor of an employer-employee relationship in that Claimant's client retained the right to terminate his services, similar to an employer's right to terminate employees at will. However, none of the other factors indicate Claimant was an employee of Debtor. There was no showing that Debtor retained control over Claimant's work; no indication that Debtor provided Claimant with equipment or a place to work; nor was it shown that Debtor withheld taxes from Claimant's fee. Also, the Treasury Regulations specify that attorneys and other independent contractors are not employees.

On this record, Claimant has not shown he was Debtor's employee for purposes of the priority provisions of the Bankruptcy Code. Therefore, Claimant's claim is not entitled to priority.

For these reasons, the objection of the Trustee to allowance of any portion of Claimant's claim as a priority claim is hereby **SUSTAINED**. Claimant's claim shall be allowed as a general, unsecured claim.

IT IS SO ORDERED.

DATED This _____ day of August, 2000.

JIM D. PAPPAS
CHIEF U.S. BANKRUPTCY JUDGE

CERTIFICATE OF MAILING

I, the undersigned, hereby certify that I mailed a true copy of the document to which this certificate is attached, to the following named person(s) at the following address(es), on the date shown below:

Office of the U.S. Trustee
P. O. Box 110
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John Krommenhoek
P. O. Box 8358
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CASE NO.: 00-00353

CAMERON S. BURKE, CLERK
U.S. BANKRUPTCY COURT

DATED:

By _____
Deputy Clerk